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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

NO. 683, Misc.

WILLIAM B. HARTSFIELD, *Petitioner*

v.

HONORABLE BOYD SLOAN,
United States District Judge for the
Northern District of Georgia, *Respondent*

ON MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF MANDAMUS, AND PETITION FOR A WRIT OF MANDAMUS

REPLY BRIEF OF PETITIONER

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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

COMES NOW the petitioner and files this his Reply Brief to the briefs of Respondents in opposition to his Motion and Petition heretofore filed.

I.

The response filed does not raise new or unanticipated questions. The status of the case below is unchanged since the order of the District Judge, the Honorable Boyd Sloan, refusing to set in motion the procedures to convene a panel court. The petition remains undismissed.

If the petitioner's prayers for mandamus are granted, he will obtain a forum in which to try his case. If the writ is denied, there will have been decided, without opportunity for a hearing in the only available forum, matters of far reaching significance in such widely different and important areas as the constitutional protection of the elective franchise, the interpretation of the Civil Rights Act of 1957 and the rule of *Ex Parte Poresky*, 290 U. S. 30.

The sole question presented in this case at the time is whether the Honorable Boyd Sloan was required by law to convene the three-judge District Court.

Title 28 USC 2281, together with Section 2284, by its language, makes the convening of the panel court mandatory whenever a complaint seeks to enjoin a state officer from enforcing a state statute on the grounds of the statute's unconstitutionality. The single judge's opinion of the merits of the complaint is immaterial. *Ex Parte Poresky*, supra. His sole duty is to examine the complaint to see if it seeks injunctive relief against the operation of a state statute on the grounds of its unconstitutionality. If it does, the statute gives the single judge no discretion; he must convene the panel court. Petitioner's complaint below was just such a bill. The only court which was authorized by law to hear the case, develop the evidence therein and to decide the merits thereof was barred to the petitioner by the respondent contrary to law.

Prior to the enactment of sub-section (5) of Title 28 USC Section 2284, there was authoritative case law exception to this statutory mandate (*Ex Parte Poresky*, supra), upon which the respondent relied in refusing to convene the panel court. Under the rule of the *Poresky* case, the panel court does not have to be convened if the *very issue* raised in the complaint has been so clearly decided by previous decisions of this Court so as to be absolutely foreclosed to controversy. This is not the case with respect to the issues raised in this petitioner's complaint below, as is clearly shown in the petition for the writ of mandamus herein.

None of the previous county unit cases were decided by

this Court on their merits. None of them upheld the constitutionality of the statute now under attack below.

In no previous county unit case or voting case has this Court held that the judiciary lacked jurisdiction to deal with this subject matter. On the contrary, *Terry v. Adams,* 345 U. S. 461; *Nixon v. Herndon,* 273 U. S. 536; and *Smith v. Allwright,* 321 U. S. 649, conclusively establish that the judiciary has and exercises such jurisdiction. The discretionary refusal to invoke equity in some previous voting cases, including the county unit case of *South v. Peters,* 339 U. S. 276, could not justify the respondent's refusal to convene the panel court for the following reasons: first, this traditional reluctance to invoke equity jurisdiction to enforce voting rights has been superseded by the will of Congress now expressed in Title 28 USC 1343 (4) enacted in September, 1957 and, second, because the determination whether a court will, in its discretion, refuse equity aid in a particular case must be made by that court itself. The respondent would not be authorized to make that determination in a case in which the discretion by law rests with a three-judge court.

Cases involving unequal *legislative* representation (*Colegrove v. Green,* 328 U. S. 549; *Remmey v. Smith,* 102 F. Supp. 708) are not in point here and cannot justify the respondent's ruling. First, the denial of relief in the *Colegrove* case can be interpreted as being no broader than a refusal to exercise equitable discretion — the decisive vote of the seven Justices participating having based the decision on that ground. Second, the *Colegrove* type case does not involve the deprivation of an individual's right to vote. In this representation type case, each individual voting for the office in question has his vote counted exactly at the same value as every other vote cast for that office. The question in this case below is completely different. It is a question purely and simply of voter disfranchisement. Petitioner below complains that he, voting for the same office, has his vote arbitrarily counted at widely varying values as compared with the votes cast by other voters in the same election. This type of discrimination is forbidden by the Constitution. See *Terry v. Adams,* supra, *United States v. Classic,* 313 U. S. 299, and *United States v. Saylor.* 320 U. S. 385.

II.

The statute under constitutional attack below gives to every qualified voter in every one of the 158 of Georgia's 159 counties many times the ballot strength of the petitioner. On a state average, *each* voter voting for the *same* office in the *same* election as the petitioner has 11.4 times his franchise. The Constitution of the State of Georgia, by its relevant provisions (Exhibit A of the complaint — page 49 Petition for Mandamus), establishes the qualifications of the petitioner and other qualified voters to vote. Presumably by its terms, the petitioner and other qualified voters have one vote each — his own. By the application of the county unit step, a vote cast in 158 counties of Georgia, presumably a single vote when cast, is in some cases made into 155, in others to 85, in others to 36, etc., depending solely on where the voter resides. Petitioner's vote, and that of those similarly situated, is frozen and, if population trends continue as they have consistently, the already gross dilution of his ballot will grow more serious each year and until and unless a court adjudicate his case.

Exact mathematical proportion may not be required by the Constitution in legislative district apportionment — for indeed it is impossible there. However, when a qualified voter votes for a single office holder, mathematical equality is not only possible but is required. We know of no exception to the rule that in voting one man shall cast one ballot which shall be counted at the same value as that cast by any other man. Under the county unit statute, voters in the adjoining counties of the petitioner's residence in the metropolitan complex of Greater Atlanta enjoy, for example, the following franchise advantage over the petitioner; in DeKalb, 2.9; in Cobb, 6.9; in Clayton, 11.3; in Gwinnett, 10.7; in Cherokee, 8.7 and in Forsyth, 17.2.

In rural south Georgia, voters in Echols County (having 85 times the franchise of the petitioner) have a tenfold advantage over their adjoining neighbors in Lowndes County. This disparity pattern is not confined to discrimination against urban voters and in favor of rural voters, but occurs between urban voters and between rural voters. In fact, the disparity pattern is statewide, wholly without justification and cannot possibly be said to reflect any plan, to say nothing of allowable policy.

Certainly the burden of justifying this discrimination should be placed on the defendants in a trial of the complaint.

The statute attacked below is as clearly unconstitutional as one which arbitrarily deprives a citizen of the right to register, or to vote or to have his vote counted. This Court in a franchise case said long ago that the Constitution "nullifies sophisticated as well as simple minded modes of discrimination." (*Lane v. Wilson* 207 U. S. 268, 275.) Further, this Court has recognized that the right to have one's vote counted without dilution (as in stuffing ballot boxes) is as equally protected as the right to register and to vote. (*United States v. Saylor*, 322 U. S. 385.)

The late Chief Justice Arthur T. Vanderbilt focused on the Fourteenth Amendment issue in the county unit system when, writing four years before the Civil Rights Act of 1957, he commented on the refusal of this Court to grant relief, saying "Out of judicial deference to the action of two state legislatures, the equal protection clause faded out of the Constitution and with it fundamental rights of citizens of Georgia and Illinois." (See Arthur T. Vanderbilt, *The Doctrine of the Separation of Powers and Its Present-Day Significance* (Lincoln: University of Nebraska Press, 1953, page 138.)

Whatever may be the jurisdictional and other problems in the representation type case in Illinois as in *Colegrove v. Green* (328 U. S. 549), the flagrant denial of equal protection to the Georgia ballot can and should be submitted to the test of a trial.

III.

Though petitioner invoked and relied on new subsection 4, Title 28 USC 1343 — the Civil Rights Act of 1957 — the court below made no effort to assess the significance to this case of the addition to the jurisdiction of the District Court. No mention was made of this Act in the decision refusing to convene the panel court.

The Civil Rights Act of 1957 was major legislation of the Eighty-fifth Congress. The terms of this legislation were debated for months in the public and congressional domain. Many objections to the Act as proposed were hotly contested and

were rejected. The debates in Congress and outside demonstrated an almost unanimity of conviction that the right to vote should enjoy full federal protection.

To secure the "elective franchise" the Congress established a new division within the Department of Justice; empowered the Attorney General to seek equitable protection of voting rights; created a Commission to study civil rights, including the right to vote, and conferred a new specific grant of jurisdiction on the District Courts.

The Civil Rights Act of 1957 reflects the temper of Congress and the country. Whether the District Court could refuse to exercise its equitable powers to decide the case below before the enactment of sub-section 4, Title 28 USC, 1343, is now beside the point. The explicit statutory jurisdiction exists to decide the case. If there is any question as to the meaning of this provision, the temper of Congress expressed in the Civil Rights Act as a whole should be considered and respected in the interpretation of the provision.

From the public statements of the Executive Branch we are led to believe that it represents this temper of Congress and if there be any doubt, we respectfully ask this Court to invite the Attorney General to express his views.

IV.

Respondents rely upon two theories to sustain their position that petitioner's motion and petition for writ of mandamus should be denied. First, they contend that mandamus from this Court is not the proper remedy and, second, the judge below correctly refused to take the steps to assemble the panel court.

A.

Mandamus from this Court is the proper remedy and this Court has so held repeatedly. The briefs filed in behalf of the respondent cite no cases from this Court to the contrary. In the one they cited, *Ex Parte Cogdell,* 342 U.S. 163 (1951) decided long after the enactment of Title 28 USC 2284 (1) (which said briefs maintain changed matters) this Court *granted* the motion for leave to file the writ of mandamus. In every circuit

court case cited and relied on by respondent, *the petition had been dismissed* and a *final* order entered.

Even so there is grave doubt as to the correctness of such rulings from these circuits in view of the authoritative decisions of this Court holding such decisions are not appealable where as here there has been no final order entered — mandamus from this Court is the sole and appropriate remedy. Briefs for the respondent cite no authority holding otherwise.

The cited case of *Wicks v. Southern Pacific Company,* 231 F. 2d 130 is no authority: In that case the petition had been dismissed; the petitioner had filed an appeal and *thereafter* claimed he should have sought mandamus; and there was no constitutional question even presented as the Railway Labor Act sought to be challenged did not legalize the union shop complained of but merely repealed *pro tanto* previous provisions prohibiting union security agreements. The cited case of *Jacobs v. Tawes,* 250 F. 2d 611 did not involve mandamus. The petition in that case had been *dismissed* and it was obvious on the face of the complaint that jurisdiction was lacking as the case was based on the jurisdictional amount and only $1904.62 was involved. The complaints in the *Wicks* and *Jacobs* cases on the face of the petitions showed that they were not appropriate for a panel court. The exact contrary is true of the case below.

In *Moore's Federal Practice* 2d Edition Vol. 6 (1953) the author states that the writ is both " 'necessary' and 'appropriate' " where ". . . the judicial action or inaction is presently non-reviewable by the normal processes of appeal . . ." as in instances such as ". . . to require a district judge to convene a three-judge court in a case for such a special court . . ." (*Moore;* supra, p. 66 and p. 67).

This rule is supported not only by numerous cases in this Court previously cited in the petition for mandamus but by sound logic — even cases where the petition has been dismissed. Mr. Chief Justice Hughes stated in *Stratton v. St. Louis South Western Ry. Co.* 282 U.S. 10, 15 and 16;

> "If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interlocutory injunction

or final decree, either *dismissing* the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this Court, as the statute plainly contemplates such a direct appeal only in the case of an order or decree by a court composed of three judges in accordance with the statutory requirement. *Nor does an appeal lie to the Circuit Court of Appeals* from an order or decree thus entered by a District Judge without authority, for to sustain a review on such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this court." (emphasis added)

The order below was clearly non-reviewable by appeal. It is equally as clear that mandamus lay only from this Court:

"Since under Section 1651 (the all writs statute) a writ is to issue in aid of the court's jurisdiction; if exclusive appellate jurisdiction over a case is vested in the Supreme Court this Court and not the Court of Appeals has jurisdiction to issue writs in that case." (*Moore, supra, page 85.*)

Nor is the power to issue the writ limited to cases where the appellate jurisdiction has already attached. The writ is usable in aid of the prospective jurisdiction which Congress has bestowed. See *McClellan v. Carland* 217 U.S. 268.

Nor is the use of the "all writ statute" in a clear case — and the failure to convene a three-judge court has been consistently held to be such — circumscribed by the artificial considerations cited in the responses. Mr. Chief Justice Stone speaking for the Court in *Ex Parte Peru*, 318 U.S. 578 stated:

"The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to *exercise its authority when it is its duty to do.* Such has been the office of writs when directed by this Court to district courts, before the Judiciary Act of 1925 and since." (emphasis added)

Mandamus, in such an instance as here, is, as Moore (supra pages 72 and 73) suggests, not an "extraordinary remedy" but "supplementary." As that author suggests, the judge "is really a 'formal' party." The judge, of course, has ". . . no more interest in upholding the questioned order than (he) has in upholding one of (his) appealable orders: the interest is profes-

sional, not legal." Further, the real parties of interest here have intervened in this Court in vigorous support of the questioned order, which is no more than proper. All of the circumstances necessary to insure a full consideration of the issue posed in this Court have come to pass.

Respondents contend that, while mandamus issuing from this Court was the appropriate remedy before the amendment codified in Title 28 Section 2284 (referred to on page 3 of the party respondents brief), this is no longer true as a result of said enactment. The only effect which this amendment could have had is that, arguably, it removed from a single judge any power to refuse to convene a three-judge court or dismiss the petition, thus overruling the rule of *Poresky* case, supra.

Respectable authority (*Berueffy, The Three-Judge Federal Court*, 15 Rocky Mt. Law Review 64; *Gowen, Comment* 28 Minn. Law Rev. 131), and the legislative history of the amendment (H. R. Report No. 1677, 77th Congress 2d Session), support this view of the amendment. Contrary, of course, is *Jacobs v. Tawes*, supra. If the amendment has any effect upon this Court's jurisdiction to grant mandamus, it only served to strengthen it. The amendment, if anything, made absolute the legal requirement for the single judge to take the steps necessary to assemble the panel court. When a judge refuses to do that which he is required by law to do, mandamus, of course, is still the appropriate remedy and there is nothing in the amendment, logic or authority to the contrary — and none has been cited on behalf of the respondent.

Briefs for respondent cite authority and the rules of this Court to the effect that mandamus is an extraordinary remedy, the issuance of which is not a matter of right but of sound discretion which is sparingly exercised. Fortunately, this offers no problem in the case at bar. This Court has, without exception, held that when a single judge refuses to convene a three-judge court, mandamus issued from this Court is the appropriate remedy. *Ex Parte Metropolitan Water Co.* 220 U.S. 539; *Ex Parte J. D. Collins* 277 U.S. 565; *Ex Parte Williams* 277 U.S. 267; *Ex Parte Public National Bank,* 278 U.S. 101; *Ex Parte Northern R.R. Co.* 280 U.S.142; *Ex Parte Hobbs* 280 U.S. 168;

Stratton v. St. Louis Southwestern R. Co. 282 U.S. 10; *Ex Parte James* 287 U.S. 573; *Ex Parte Poresky,* 290 U.S. 31; *Ex Parte Bransford,* 310 U.S. 354. This is one field at least where the appropriateness of mandamus has been settled by this Court.

B.

The briefs filed in support of respondents conclusively demonstrate why a panel court must be summoned. The questions raised are so clearly debatable that they can only be decided in the forum Congress provided for the development of evidence and argument on such issues.

The Democratic Party defendants claim, for example, that the constitutional protection of the right to vote in a state election is protected only by the 15th and 19th amendments and not by the 14th (party defendants' brief, pages 12 and 13). Such a far reaching assertion could, of course, only be heard and resolved after a hearing before a panel court. Furthermore, it would have to be resolved against the respondents for this assertion is fundamentally in contradiction of Mr. Justice Holmes holding of a unanimous court in *Nixon v. Herndon* 273 U.S. 536, 540, 541: "We find it unnecessary to consider the 15th Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the 14th." In addition, beginning with the *Granger* cases, 94 U.S. 155, it has been consistently held that the 14th Amendment protects against discrimination other than on the basis of race.

These party defendants further assert that the district judge below "was eminently correct when he paid no heed to the argument that the Civil Rights Act of 1957" had any bearing on this case. The reasoning these defendants develop is that the 1957 Act "does not enlarge the jurisdiction of the federal courts so as to permit actions to recover damages or to secure equitable or other relief for the protection of the right to vote in a party primary to nomiate candidates for state offices" (page 10 of brief of party defendants). This manifestly is a matter which could not be decided by the judge below. Since there are no prior decisions of this Court interpreting this Act, the very fact that petitioner invoked this new Act in his complaint and contended that it had a material effect on any ad-

verse authority in this field was sufficient of itself to require the judge to initiate the steps to convene the panel court. At the outset of the judicial history of this Act, could it conceivably by proper, without a full development of the case, to say that the jurisdiction conferred by the Act has no application to a voter in a primary for the Governor, Lieutenant Governor and the highest judicial offices of a state in which the primary is the equivalent of election and fully controlled by state law?

Terry v. Adams, 345 U.S. 461, held that a pre-primary primary, unregulated by state law, *and for county and precinct offices,* was constitutionally protected. This decision post dates all previous county unit cases and it disposes of the challenge by these defendants below to the very vitals of the Civil Rights Act of 1957. In the *Terry* case, the suit, *inter alia,* was based on Title 8, USC, Section 43, the language of which was precisely that on which the case below was based, namely, Title 42 USC, 1983. Thus the following is true:

The new Civil Rights Act, Title 28 USC, 1343 (4) confers equity jurisdiction on the district court in cases ". . . under any act of Congress providing for the protection of civil rights, including the right to vote."

Title 42 USC 1983 (Title 8 USC 43) is such an Act of Congress and one which has many times been held by this Court as protecting the right to vote in general elections, in primaries and now in pre-primary primaries and for even county and precinct offices because these are "rights . . . secured by the Constitution and laws . . ." specifically mentioned in said Titles and sections.

Manifestly then it was error for the district judge to pay no heed to this Civil Rights Act of 1957. It was likewise error to rely on *Cox v. Peters* 208 Ga. 498; 342 U.S. 936 as the defendants now do on the grounds that the Georgia primaries were divested from the control of the Constitution of Georgia ". . . so as to make (them) without the ruling in *Smith v. Allwright* 321 U.S. 649" (page 16 of the brief filed by the party defendants). *Terry v. Adams,* supra, post dates *Cox v. Peters,* supra, and disposes thereof.

Not a single case cited on behalf of the respondents post dates the amendment to the Civil Rights Act of 1957.

Appendix A traces the history and development of the Federal right of suffrage and the traditional discretionary denial of equitable relief to protect the right to vote.

Respectfully submitted,

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APPENDIX A

HISTORY AND DEVELOPMENT — FEDERAL RIGHT OF SUFFRAGE AND TRADITIONAL DISCRETIONARY DENIAL OF EQUITABLE RELIEF TO PROTECT THE RIGHT TO VOTE

As recently as 1874 the Supreme Court held that the right of suffrage was not among the privileges and immunities to which citizens are entitled under the Constitution (*Minor v. Happersett,* 21 WALL 162). However, in a line of cases beginning with *Ex Parte Yarbrough,* 110 U.S. 651 (1883) and culminating in *Terry v. Adams,* 345 U.S. 461 (1953), it recognized that the Fourteenth (under the equal protection clause) and Fifteenth Amendments protect the electorate from discrimination, even by a "private" political party, in any portion of the electoral process, including a pre-primary primary election. The development of this federally protected right is interesting and significant.

In the *Yarbrough* case, supra, the Court held that there is a Constitutional right to vote for members of Congress, and that Congress has authority to enact laws protecting this right. Then in *Wiley v. Sinkler,* 179 U.S. 58 (1900), it was established that federal courts have jurisdiction of actions for damages because of abridgement of this Federal right of suffrage, and subsequent cases have affirmed this view, e.g., *Swafford v. Templeton,* 185 U.S. 487 (1902); *Nixon v. Herndon,* 273 U.S. 536 (1927); *Nixon v. Canden,* 286 U.S. 73 (1932); *Smith v. Allwright,* 321 U.S. 649 (1944).

The right to vote was held to include the right to have one's vote honestly counted in *United States v. Mosley,* 238 U.S. 383 (1915). This has been extended to embrace the right to have the vote counted at full value without dilution or discount (*United States v. Saylor,* 322 U.S. 385 (1943), and to apply in primary elections as well as to general elections. *United States v. Classic,* 313 U.S. 299 (1941).

Since the Fourteenth and Fifteenth Amendments protect one against disfranchisement only if the wrong is done by a state, discrimination was sought to be accomplished with impunity

by Private Political Party action via primary elections as distinguished from state action. This stood for a while, but that possibility has also been flatly foreclosed by the Supreme Court. Three cases laid the foundation for eliminating this loophole. *Nixon v. Herndon,* supra (1927), invalidated a Texas statute expressly restricting the vote to white citizens. In an attempt to circumvene the effect of this decision, the same result was accomplished by a resolution of the Democratic Party Executive Committee, authorized by state statute, excluding Negroes. This was also invalidated by the Court in *Nixon v. Candon,* supra (1932). Then, when the party passed the same rule in a state party convention, this Court refused to intervene (*Grovey v. Townsend,* 295 U.S. 45 (1935), holding that the refusal of a state officer to permit a person to vote in a Democratic primary election, where such refusal was by virtue of a resolution adopted in a state party convention, was not state action in violation of the Fourteenth and Fifteenth Amendments to the Federal Constitution. But nine years later, the *Grovey* case was expressly overruled in *Smith v. Allwright,* supra (1944). Thus, in *Smith v. Allwright,* this Court affirmed the proposition that the Fourteenth and Fifteenth Amendments, although limited in effect to "State Action," forbade disfranchisement of voters even by a "private" political party in any portion of the electoral process, including primary elections. A later Court of Appeals decision (*Rice v. Elmore,* 165 F. 2d 387 (1948) applied this principle to outlaw discrimination in primary elections, even though there was no reference to the primary in the state constitutions and statutes. The Court went even further in *Terry v. Adams,* 345 U.S. 461. That was a class action instituted by Negro citizens of a Texas county against officers of an organization called the Jaybird Democratic Association, seeking declaratory and injunctive relief. The organization was run like other political parties. Its membership was limited to white people, who were automatically members if their names appeared on the official list of county voters. Its primaries were held prior to the primaries of the Democratic Party and not on the date fixed by state law for primaries. The names of the nominees were put on the ballot in the Democratic Primary without indication that they had been nominated by the organization. The defense was that the organi-

zation was not a political party but a self-governing voluntary club, whose action was not state action. Also relevant to the case at bar is the fact that in the *Terry* case,

(a) the plaintiffs there proceeded by the same route as does plaintiff here, i.e., Title 42 USC 1983 and Title 28 USC 1343;

(b) plaintiffs there sought and obtained equitable relief similar to that sought by plaintiff in the case at bar;

(c) holds that the federal right of suffrage protects against voting discrimination in selecting public officials even though state or local.

Suits at law for damages caused by improper deprivation of the federal right of suffrage, and criminal actions against similar misdeeds have been consistently entertained in the federal forum. But injunctive relief, which by flexible decrees assures the parties the closest approximation of their normal rights and duties, remains hedged about by the traditional refusal to grant equitable relief in cases involving political rights, such as the right to vote (prior to the enactment of the Civil Rights Act of 1957 — Title 28 USC Section 1343[4]).

The basis for this equitable limitation is found in analysis of the equitable powers of the courts. The touchstone of equity jurisdiction is the protection of a property right (*Gee v. Prichard*, 2 Swans 402, 36 Eng. Rep. 670, ch. 1818) and consequently equitable relief could in the past be refused to protect political rights such as the right to vote. Therefore, a court ordinarily does not have the power to issue an injunction or lend the aid of equity to interfere with or attempt to control the exercise of political rights unless jurisdiction is conferred by constitutional or statutory provision. 43 C.J.S. ¶169 at p. 811 and 812; *People v. McWeeney, et al.*, 102 N.E. 233. The Court's reluctance to entertain equitable jurisdiction over voting cases must not be misconstrued as a *lack* of jurisdiction over such subject matter; rather, it is a self-imposed discretionary limitation — the traditional refusal to exercise equitable jurisdiction to protect voting rights. That the Supreme Court's refusal to entertain jurisdiction in such cases as *South v. Peters*, 339 U.S. 271, does not emanate from a *lack* of jurisdiction, but rather from a failure to exercise it, is conclusively demonstrated by the fact that

the Court has exercised jurisdiction over numerous suits at law for damages caused by improper deprivation of the Federal right of suffrage (e.g., *Nixon v. Herndon, Nixon v. Candon, Smith v. Allwright,* supra) and also by the fact that Federal Courts have on occasions exercised equity jurisdiction to protect the right to vote (e.g., *Terry v. Adams, Rice v. Elmore,* supra, and *Smiley v. Holm,* 285 U.S. 355).

In the voting cases in which equitable jurisdiction was not exercised by the Courts they were usually able to find many obstacles which justified the refusal to exercise equitable power, none of which are present in the case at bar. Equitable relief in connection with the right to vote was first directly considered in *Giles v. Harris,* 189 U.S. 475 (1902). In the *Giles* case, the plaintiff simultaneously asked the Court to declare certain state statutes which forbade the registration of Negroes unconstitutional and sought a mandatory injunction to compel the defendant board of registrars to register himself and 5,000 other Negroes under said statutes. The Court refused to exercise its equity jurisdiction. The inconsistency of plaintiff's position and the difficulty of supervising the enforcement of the decree were relied on by the Court, but the case has been cited by lower courts for the sweeping proposition that equity will not protect political rights (*Blackman v. Stone,* 17 F. Supp. 102), a conclusion that is manifestly erroneous in view of *Terry v. Adams, Rice v. Elmore,* supra. Perhaps the compelling reason the Court refused to use the injunctive process in the *Giles* case has been lost sight of: Mr. Justice Holmes pointed out that Title 43 USC 1983, while giving persons the right to equitable relief in voting cases, did not provide a remedy or confer equitable jurisdiction to the Federal courts over such cases. However, Federal courts are given jurisdiction by Title 28 USC 1343 over suits brought under the provisions of Title 43 USC 1983. Title 28 USC 1343 was amended in September, 1957, by adding a new section which pointedly conferred such equitable jurisdiction and remedied any defect noted by Justice Holmes in the *Giles* case.

Three cases involving mandamus proceedings which brought into question the validity of state laws setting up Congressional Districts were decided in 1931. In *Smiley v. Holm,* 285 U.S. 355,

Koening v. Flynn, 285 U.S. 375, and *Carroll v. Becker,* 285 U.S. 380, the issue was the same. The defendants in each case vigorously contended that these were non-justifiable issues, concerning matters which should be left to the "Political Departments" to decide. In each case this defense was rejected; jurisdiction was exercised and judgment rendered to the effect that the respective redistricting acts were invalid and that elections be held at large until appropriate state legislation provided for districts. Then came *Colegrove v. Green,* 328 U.S. 549 (1946). The plaintiff in that case sought a declaratory judgment to the effect that the Illinois redistricting acts denied them equal protection of the laws and asked for an injunction against the coming election. If the decree had been granted, the result would have been an election at large in the State. The *Colegrove* case cannot be taken as holding that the question presented was non-justifiable inasmuch as a majority of the members thought that *Smiley v. Holm* had determined that such issues were justifiable. Mr. Justice Rutledge agreed with the dissent that the Court had jurisdiction but thought that the injunction was rightly denied as a matter of equitable discretion. That the Court did not accept the doctrine of non-justiciability seemingly expressed by Mr. Justice Frankfurter in the *Colegrove* case seems to be borne out by the later case of *MacDougall v. Green,* 335 U.S. 281 (1948). The underlying issues in the two cases are closely similar. In both, if injunctive relief had been granted, an impending election would have been seriously disrupted. In both, the Court sitting as a court of equity was asked to apply the same constitutional clause to the same type of legislative activity on the basis of similar factual data at the behest of similarly situated members of political parties. Although the injunction applied for in the *MacDougall* case was denied by a divided court, the decision was made on the merits. The unanimous assumption of jurisdiction without discussion can be taken as a holding that such political rights cases are justiciable, and further, that equity jurisdiction may be exercised. Between the *Colegrove* and *MacDougall* holdings, *Cook v. Fortson* and *Turman v. Duckworth,* 329 U.S. 674, were decided. In a per curiam decision, the Court held that inasmuch as the election sought to be enjoined had already been held, the cases were moot and should be dis-

missed. They are not illuminating on the injury now being undertaken except for the fact that Justices Black and Douglas noted jurisdiction. *South v. Peters,* supra (1950) is consistent with the prior cases of *Colegrove v. Green* and *MacDougall v. Green,* supra, inasmuch as the refusal to grant relief was not based upon *lack* of jurisdiction but rather on the discretionary refusal to exercise equity jurisdiction, as clearly demonstrated by the language of the holding:

> "Federal Courts consistently refuse *to exercise* their *equity powers* in cases posing political issues . . ." (emphasis added)

Justices Black and Douglas dissented, holding the Georgia County Unit System unconstitutional and pointing out that the Court not only had jurisdiction but should exercise it.

After *South v. Peters, Cox v. Peters,* 208 Ga. 498, 342 U.S. 936 (1952), was decided. That case does not involve an equity question and is not relevant to the present discussion. The recent case of *Terry v. Adams,* supra, conclusively proves that Federal Courts do not lack jurisdiction to grant injunctive and equitable relief in voting cases.

In September, 1957, Congress took matters into its own hands and enacted legislation pointedly conferring equitable jurisdiction over voting cases to the District Courts (28 USC 1343(4)):

> "The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (4) to recover damages OR TO SECURE EQUITABLE OR OTHER RELIEF, under any Act of Congress providing for the protection of civil rights, INCLUDING THE RIGHT TO VOTE. (Emphasis supplied) (Sec. 28USC 1343 (4)).

Federal Courts, therefore, are no longer justified in refusing to exercise equitable jurisdiction to protect voting rights on traditional grounds, any tradition having been superseded by legislation. Therefore, prior decisions of this Court which were based upon this proposition (such as *South v. Peters,* supra, and *MacDougall v. Green,* supra) cannot support Respondents' position.

PROOF OF SERVICE

I, Morris B. Abram, one of the attorneys for William B. Hartsfield, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ..... day of May, 1958, I served copies of the foregoing Brief to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the Honorable Boyd Sloan, Judge of the United States District Court for the Northern District of Georgia, Atlanta Division, by mailing a copy in a duly addressed envelope, with first class postage prepaid to his Chambers, Third Floor, United States Post Office Building, Atlanta, Georgia.

2. On John Sammons Bell and George D. Stewart, as Chairman and Secretary, respectively, of the State Democratic Committee of Georgia, on the State Democratic Executive Committee of Georgia, on the Georgia Democratic Party, and on Hon. Ben W. Fortson, Jr., Secretary of State of Georgia, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To Charles J. Bloch, Esq., First National Bank Building, Macon, Georgia, Attorney for all defendants except Ben W. Fortson, Jr.

To Hon. Eugene Cook, The Attorney General, Judicial Building, Capitol Square, Atlanta, Georgia, and B. D. Murphy, Esq., Citizens & Southern National Bank Building, Atlanta, Georgia, Attorneys for Ben W. Fortson, Jr., Secretary of State of Georgia.

3. On the United States Conference of Mayors, by mailing a copy in a duly addressed envelope, with first class postage prepaid to its Attorneys of Records, as follows:

To Edward Burling, Jr., Union Trust Building, Washington, D. C.

To Wallace M. Cohen, 1832 Jefferson Place, Washington, D. C.

To John J. Gunther, 1707 H Street, N. W., Washington 6, D. C.

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